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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MTA NEW YORK CITY TRANSIT AUTHORITY,

Petitioner,

v.

JOHN REITER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fed. R. Civ. P. 68 provides that a party who rejects an offer of judgment must pay the costs incurred after the making of the offer if the judgment obtained by offeree "is not more favorable than the offer." Under *Marek v. Chesny*, 473 U.S. 1 (1985), a plaintiff prevailing under a statute that authorizes an attorney's fees award as an element of costs may not recover attorney's fees incurred after rejecting an offer of judgment unless the judgment meets the Rule 68 test. Here, a Title VII plaintiff rejected a monetary offer of judgment, obtained a judgment for a lesser monetary amount and non-monetary relief, and sought attorneys' fees. The following questions are presented:

1. Whether a determination that non-monetary relief in a judgment is more favorable than a monetary offer of judgment must be based on trial court findings as to the objective value of that non-monetary relief, without weighing the relative importance of public policies underlying that relief.

2. Whether a party seeking an award of attorney's fees after rejecting an offer of judgment should bear the burden of proof as to the value of non-monetary relief in the judgment.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner MTA New York City Transit Authority, a public benefit corporation of the State of New York, was a defendant in the district court, and the appellee in the court of appeals.

Respondent

The Respondent John Reiter, an individual, was the plaintiff and the appellant in the court of appeals.[1]

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[1] Two other defendants in the original lawsuit, Metropolitan Transportation Authority of the State of New York and Mysore L. Nagaraja, had claims against them dismissed at the trial level. They were not parties in the Second Circuit and are not parties in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MTA New York City Transit Authority ("TA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 457 F.3d 224 (2d Cir. 2006). A copy of the opinion of the Second Circuit is included in Appendix A. App., *infra*, at 1a. An order of the United States Court of Appeals for the Second Circuit denying MTA New York City Transit Authority's Petition for Rehearing *en banc* was entered on September 29, 2006. A copy of the order denying the *en banc* petition is included in Appendix C. App., *infra*, at 48a. The order of the Magistrate Judge, United States District Court for the Southern District of New York, is reported at 224 F.R.D. 157 (S.D.N.Y. 2004). A copy of the order is included in Appendix B. App., *infra*, at 20a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 20, 2006. Petitioner filed a Petition for Rehearing *en banc*, which was denied on September 29, 2006. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S. C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Civil Procedure 68 provides in pertinent part:

> [A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

A copy of Fed. R. Civ. P. 68 is included in Appendix D. App., *infra*, at 50a.

STATEMENT OF THE CASE

The plaintiff in this Title VII retaliation case challenged the decision of the TA to transfer him from the position of Deputy Vice President, Engineering Services ("DVP, Engineering") to Deputy Vice President, Technical Services ("DVP, Technical"). The transfer did not change plaintiff's DVP title, compensation or benefits. App., *infra*, at 23a. A jury found that the TA made the transfer because plaintiff had recently filed an EEOC charge. The district court entered a judgment that reinstated plaintiff as DVP, Engineering and required payment of $10,000 for emotional injury, but denied all claims for backpay and prospective injunctive relief. App., *infra*, at 30a.

Plaintiff applied for an award of attorneys' fees, including fees for the period after he rejected a Rule 68 offer of $20,001 (plus attorneys' fees incurred through the offer date). App., *infra*, at 31a. The application was referred, by consent of the parties, to a Magistrate Judge for final disposition.

The Magistrate Judge made factual findings that the DVP, Technical and DVP, Engineering positions were identical in terms of current compensation and benefits and that the DVP, Engineering position did not have any greater long term economic value than the DVP, Technical position. App., *infra*, at 45a-46a. The Magistrate Judge also found that, while the alleged "superior status" of the DVP, Engineering position (in terms of its greater managerial responsibilities and perquisites) had "some monetary value," such status "certainly is not objectively more favorable than a $10,001 payment." App., *infra*, at 42a. The Magistrate Judge then denied attorneys' fees and costs for the period after the offer of judgment was made.

The Second Circuit reversed, holding that this decision: "(1) fails to appreciate the significance of equitable relief in civil rights litigation, and (2) draws indefensible conclusions about the worthlessness of the equitable relief [plaintiff] Reiter obtained." App., *infra*, at 10a. The Second Circuit then made its own factual findings, with no evidentiary support, that: (1) "any senior executive worthy of the title (who is rational and who is still anxious for responsibilities)" would take another job with greater responsibilities and equal compensation; and (2) "any such rational executive would more likely than not jump at the chance if it were priced at just $10,000." App., *infra*, at 16a. In making those findings, the Second Circuit allocated to the TA the burden of proof with respect to whether a judgment is more favorable than a Rule 68 offer.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Weighing the Relative Importance of a Form of Relief in Determining Whether a Judgment Is More Favorable Than an Offer of Judgment Undermines the Effectiveness of Rule 68 and Is Contrary to *Marek v. Chesny*.

The Second Circuit held that the "equitable relief Reiter secured was of considerable importance under Title VII's overall remedial framework" and that this factor must be taken into account in determining whether reinstatement is more favorable than a monetary offer of judgment. App., *infra*, at 13a. This ruling undermines the effectiveness of Rule 68 and frustrates its underlying policies in civil cases in which plaintiffs seek non-monetary relief. Also, contrary to *Marek v. Chesny*, 473 U.S. 1 (1985), this ruling interjects substantive policies underlying the relief obtained by a plaintiff into the application of Rule 68, treats civil rights plaintiffs differently from other plaintiffs, and restricts defendants in structuring settlement offers. This ruling also improperly places a monetary value on reinstatement that exceeds its objective economic value as routinely calculated in numerous employment discrimination cases in which courts award front pay in lieu of reinstatement. This Court should grant the petition to preserve the purpose and efficacy of Rule 68 and to harmonize the Rule 68 process with the lower courts' calculation of the monetary value of reinstatement.

1. The ruling undermines Rule 68.

The Second Circuit's ruling will have a substantial adverse effect on defendants' ability to make Rule 68 money offers in civil cases in which plaintiffs seek non-monetary relief. Such

offers will become impracticable, or significantly more costly, because this ruling aggravates existing difficulties in determining the objective value of non-monetary relief[2] by adding two even less readily quantifiable factors.

First, a defendant making a Rule 68 offer will have to assess the "importance" of each of the various forms of non-monetary relief a plaintiff seeks in terms of the statutory or common law policies underlying each claim. For instance, in a case in which plaintiff seeks both injunctive and monetary relief for Lanham Act, antitrust and unfair trade practice violations, the defendant will have to determine the relative importance of each type of potential injunctive relief in each federal and state statutory scheme.

Second, the defendant will then have to attempt to place a monetary value on each level of importance, without any judicial guidance as to how to make that valuation. The Second Circuit neither explained how it valued the "importance" of reinstatement for purposes of a comparison with a monetary offer of $10,001 in this Title VII case, nor how courts should value equitable relief in the broad range of statutory and common law cases to which Rule 68 applies.

The Second Circuit ruling also undermines a primary purpose of Rule 68: to encourage settlements by making a plaintiff "'think very hard'" about continuing his case. *Marek*, 473 U.S. at 11. The complexity and unpredictability of

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[2]*See Marek v. Chesny*, 473 U.S. 1, 32 and n.48 (1985) (Brennan, J., dissenting) ("it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success"); *Reiter*, App., *infra*, at 15a ("Readily acknowledging the difficulties posed by a comparison of monetary and equitable relief . . ."); *Spencer v. General Electric Co.*, 894 F.2d 651, 664, n.21 (4th Cir. 1990) (describing the issue as "thorny"); *BIC Leisure Prods, Inc. v. Windsurfing Int'l, Inc.*, 850 F. Supp. 224, 229 (S.D.N.Y. 1994) ("there is a serious question whether non-monetary relief may be included in computing the relative favorability of offer and judgment under Rule 68").

determining the relative importance of a particular form of equitable relief and the monetary value of such importance will encourage plaintiffs who seek non-monetary relief to avoid serious consideration of Rule 68 offers.

Also, since Rule 68 is neutral in its application, *Marek*, 473 U.S. at 10, the lower courts will have to make these same thorny valuation assessments with respect to both offers and judgments. Will a plaintiff who rejects an offer of reinstatement plus attorney's fees, and then obtains a judgment of $10,000 without reinstatement, be denied post-offer attorney's fees because he has obtained a "lesser" remedy (in terms of importance) than reinstatement? *Cf. Real v. Cont'l Group, Inc.*, 653 F. Supp. 736, 739 (N.D.Cal. 1987) (disregarding an offer of reinstatement in finding a monetary judgment to be more favorable than the offer).

The significance of robust incentives for settlement of civil cases, and the need to give full effect to Rule 68 as a means to achieve settlements, is at least as great now as it was when this Court decided *Marek* twenty one years ago. Review of the Second Circuit decision will provide this Court with the opportunity to reaffirm the core policies underlying Rule 68 and provide necessary guidance to the lower courts in how to assess whether a judgment or an offer of judgment is more favorable when either, but not both, includes non-monetary relief.

2. The ruling is contrary to *Marek*.

In *Marek*, this Court rejected the argument that the policy underlying the attorney's fees provisions of 42 U.S.C. § 1988, to enable civil rights plaintiffs to have effective access to the courts, should take precedence over the policies underlying Rule 68. 473 U.S. at 10. Rather, this Court held that there was no basis to place civil rights claims "on any different footing from other civil claims insofar as settlement is concerned." *Id.* Here, the Second Circuit has placed Title VII

plaintiffs on a "different footing" from other plaintiffs who seek equitable relief, because the relative importance of reinstatement in effectuating the policies of Title VII differs from the importance of equitable remedies under other statutory schemes.

Taking the preferred status of reinstatement into account also creates a conflict with the key Rule 68 policy to facilitate settlements by making "plaintiffs 'think very hard' about whether continued litigation is worthwhile." *Marek*, 473 U.S. at 11. This conflict extends beyond the adverse practical impact on the Rule 68 process noted in Point A1. The Second Circuit emphasized that reinstatement is a preferred remedy "because it accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct." App., *infra*, at 11a. Such deterrence encompasses general deterrence affecting the conduct of all employers subject to Title VII, as well as the conduct of the defendant as to all of its other employees. Allowing a plaintiff to disregard a reasonable monetary offer and then claim that the general deterrent effect of the equitable relief he obtained is more favorable than the individual settlement payment he was offered encourages a plaintiff to shift his assessment of an offer away from the merits of his own case. For instance, if Reiter had rejected a $100,000 offer from the TA, but had only been awarded $10,000 and reinstatement, under the Second Circuit's decision he might still have avoided the Rule 68 consequences of rejecting that offer by asserting that the deterrent effects of his reinstatement benefited thousands of TA employees, and millions of other employees covered by Title VII.

Indeed, considering the deterrent effect of a judgment obtained by a plaintiff directly undermines Rule 68 as construed in *Marek*. Adjudicated judgments generally have a greater deterrent effect than an entry of judgment under

Rule 68: adjudicated judgments result in public fact finding of wrongful conduct, have collateral estoppel effects, and have precedental value. Taking these generally greater deterrent effects into account in comparing judgments and offers of judgment inherently tilts the scales against Rule 68 offers and thus contradicts Rule 68's purpose of furthering the settlement of civil cases. *See generally Jolly v. Coughlin*, No. 92 Civ. 9026 (JGK), 1999 WL 20895, *8 (S.D.N.Y. Jan 19, 1999) (rejecting the argument "that the vindication of [plaintiff's] constitutional rights through the jury's verdict, in conjunction with the monetary damages [of $30,000], is more favorable than the $30,360 offer of judgment which lacked an admission of liability" because vindication is implicit in every judgment).

In addition, the impracticability of offering solely monetary relief when a plaintiff seeks non-monetary remedies, as described in Point A1, will as a practical matter require defendants to structure offers to include equitable relief in order to obtain the benefits of Rule 68. This impact is contrary to both the language of the Rule and the decision of this Court in *Marek*. Inducing a preference for equitable offers is inconsistent with the broad and neutral language of the first sentence of Rule 68, which authorizes offers "for the money *or* property *or* to the effect specified in the offer." F. R. Civ. P. 68 (emphasis added). As this Court held in *Marek*, and as the lower federal courts have re-affirmed, Rule 68 does not restrict or dictate the form of relief to be included in an offer of judgment.[3]

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[3] In *Marek*, this Court rejected plaintiff's challenge to the validity of an offer "'for a sum, including costs now accrued and attorney's fees'" that did not allocate payments between damages and costs, because there is nothing in the language of Rule 68 that requires such allocations. 473 U.S. at 6. Subsequent lower federal court decisions have consistently found that Rule 68 offers of judgment solely for money are valid even when the complaint seeks equitable or declaratory relief. *See BIC Leisure Prods.*, 850 F. Supp. at 229; *Domanski v. Funtime, Inc.*, 149 F.R.D. 556, 558 (N.D.Ohio

3. The ruling is inconsistent with the standard for calculating front pay.

The Magistrate Judge found that there was no evidence that the future economic value of the reinstated DVP, Engineering position was greater than the future value of the DVP, Technical position which plaintiff held at the time of the offer, and that the non-economic elements of reinstatement were not objectively worth more than $10,001. App., *infra*, at 45a - 46a. There is no basis in the decisions on which the Second Circuit relied to disregard or over-ride those findings of fact, or to increase the economic value of reinstatement by arbitrarily adding the "importance" of the remedy to that amount.

By attributing a significant value to reinstatement beyond the likely future compensation plaintiff would earn as a result of reinstatement, the Second Circuit deviated from the method the Courts of Appeals have consistently applied in awarding front pay in employment discrimination cases. Courts (including the Second Circuit) have at times declined to order reinstatement where it would result in the displacement of an innocent incumbent, or where animosity between plaintiff and other employees would make reinstatement unfeasible.[4] In these circumstances, courts award front pay based on evidence of the likely amount of

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1993); *Lish v. Harper's Magazine Foundation*, 148 F.R.D. 516, 520 (S.D.N.Y. 1993); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 749 F. Supp. 331, 333 (D.Mass. 1990).

[4] *See, e.g., McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1146 (10th Cir. 2006); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996); *E.E.O.C. v. Century Broadcasting Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992). *See generally Pollard v. E.I. duPont de Nemours & Co.*, 532 U.S. 843, 846 (2001) (noting lower courts have awarded front pay where "reinstatement is not viable because of continuing hostility between the plaintiff and the employer").

lost future earnings, but do not include an additional payment to compensate plaintiff for not receiving the preferred remedy of reinstatement.[5]

B. The Second Circuit Exceeded Its Authority in Substituting Its Fact Findings, Which Were Not Based on Record Evidence, for the Fact Findings of the Magistrate Judge.

In *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986), this Court held that a Court of Appeals may not make "factual findings on its own" after determining that the trial court's findings of fact are either insufficient or clearly erroneous, but rather must remand to the trial court to make any necessary findings of fact. The Second Circuit not only erred by holding that the Magistrate Judge's finding of fact (that plaintiff's reinstatement was not worth more than $10,001) was clearly erroneous,[6] but also exceeded its authority by making its own finding (unsupported by record evidence) that the value of plaintiff's reinstatement was greater than $10,001.

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[5] *See, e.g., McInnis*, 458 F.3d at 1146 ("The following factors are relevant in assessing such an award: 'work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which the plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value'"), *quoting Whittington v. Nordam Group Inc.*, 429 F.3d 986, 1000 (10th Cir. 2005); *Cowan v. Stafford R-VI School Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998); *Padilla*, 92 F.3d at 126.

[6] The two Courts of Appeals to address the issue have held that the determination of the value of a judgment or offer is a finding of fact subject to a clearly erroneous standard of review. *See Reiter*, App., *infra*, at 9a; *Garrity v. Sununu*, 752 F.2d 727, 731 (1st Cir. 1984).

The Second Circuit reversed the Magistrate Judge's finding with regard to the value of reinstatement based on both the "importance" of the remedy and the court's speculation that a rational executive would "jump at the chance" to pay $10,000 to transfer to a position within an organization with greater responsibilities, but no greater economic value.[7] App., *infra*, at 16a. This assumption is pure conjecture, unsupported by record evidence or by judicial notice of labor economics research regarding how executives make intra-organization transfer decisions. It is contrary to both labor economics and common sense, which assume that: (1) employers need to offer greater compensation in order to induce employees to accept positions with greater responsibilities;[8] and (2) employees do not voluntarily accept changes in position with their current employer which have both greater responsibilities and lower compensation (absent a likelihood of a future payoff). Indeed, an involuntary assignment to a position with greater responsibilities and lower compensation would almost surely be considered evidence of adverse treatment rather than a welcome opportunity for advancement.

To determine the value of a transfer from one position to another within an organization usually requires calculating the difference in present and anticipated compensation

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[7] Since employees do not pay their employers to make transfers, this is effectively a finding that a rational executive would gladly accept a position with greater responsibilities in which his anticipated future compensation has a current value which is $10,000 less than the anticipated future compensation in his current position.

[8] *See, e.g.*, Hans van Ophem, *et al.*, *Job Complexity and Wages*, 34 INTL. ECON. REV. (No. 4) 853, 856 (1993) ("Individual have preferences; they appreciate higher wages and may or may not desire jobs with greater difficulty levels for intrinsic job satisfaction, or for reasons of status, or whatever. To keep things simple, let us assume that individuals do not desire more complex jobs unless there is monetary compensation for doing so.").

between the two positions based on record evidence. As noted in Point A3, the Magistrate Judge found that this method for measuring the value of reinstatement following a transfer yielded a value of zero for plaintiff's reinstatement. App., *infra*, at 40a. This finding was supported by evidence that: (1) plaintiff had received the identical salary and benefits in the DVP, Technical position that he had received and would have received in DVP, Engineering; and (2) the district court had completely denied plaintiff's backpay claim. *Id.* The Magistrate Judge also found that there was no evidence that the DVP, Engineering position had any greater economic value than the DVP, Technical position in terms of future advancement or compensation. *Id.* None of these findings was found to be clearly erroneous.

The Magistrate Judge then considered and rejected plaintiff's assertion that the additional "status" associated with the DVP, Engineering position, because of its greater managerial responsibilities, supported a finding that plaintiff's reinstatement was worth more than $10,001. The Magistrate Judge noted, in the absence of specific evidence regarding how public agency executives value transfer opportunities which have greater responsibilities than, but the same pay as, their current positions, that: "acquiring a job with superior status may be of great significance to some individuals, who might willingly pay money to obtain it, and absolutely meaningless to others, who would gladly take even a small amount of cash in exchange for giving up such status." App., *infra*, at 41a. The Magistrate Judge concluded that plaintiff's reinstatement was not worth more than $10,001: "While the Court would be inclined to accord some monetary value to the superior status of the DVP Engineering position, including its various perquisites, it cannot say that it would be any great amount when considered from an objective observer's point of view." *Id.*

This finding was supported by evidence presented by plaintiff that the TA used an executive compensation system (the Hay Points system) to establish salary rates for managerial positions based on "accountability, responsibility, things of that sort[,]" and that in general "the higher the number of Hay Points, the more responsible the job, and the higher the salary."[9] Thus, the only record evidence that is probative of whether reasonable TA executives place a value of more than $10,000 on a managerial position with equal compensation but greater responsibilities indicates that they do not, because the evidence indicates that the TA uses higher salaries to induce executives to take positions of greater responsibility.

The Second Circuit's determinations that the Magistrate Judge misapprehended the "significance of the equitable relief" under Title VII, misallocated the burden of proof, and committed clear error in finding, based on the record, that the value of reinstatement was less than $10,001, even if correct, do not inevitably result in a finding that the value of reinstatement must be greater than $10,001. Rather, under *Icicle Seafoods*, the Second Circuit should have remanded to the Magistrate Judge to reassess the record and determine whether any additional factual submissions were warranted

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[9] (Joint Appendix, A-356). Plaintiff argued below that his reinstatement had economic value because DVP, Engineering had been assigned 1560 Hay Points and DVP, Technical had not been assigned Hay Points. The Magistrate Judge found that in this particular instance "the restoration of the Hay Points had no practical or economic significance," because plaintiff had testified that the TA's not assigning Hay Points to DVP, Technical "was an indication only 'that the position never had a job description written for it and evaluated' since the position had only recently been created;" and plaintiff had admitted that the absence of Hay Points for DVP, Technical had not affected his salary and that his salary had increased while serving as DVP, Technical notwithstanding the lack of assigned Hay Points. App., *infra*, at 45a.

in order to decide the objective value of plaintiff's reinstatement.

C. A Rule 68 Offeree Should Have the Burden of Proof As to Whether a Non-Monetary Judgment Is More Favorable Than a Monetary Offer of Judgment.

The correct allocation of the burden of proving the value of non-monetary relief is a recurring issue in Rule 68 cases in which either the offer or the judgment includes injunctive or declaratory relief. A resolution of this issue by this Court will assist the lower federal courts in resolving the difficult task of valuing non-monetary offers and judgments.[10] It will also provide guidance to parties in deciding whether to make or accept, and how to structure, Rule 68 offers.

The Second Circuit based its decision that "the defendant bears the burden of showing that the Rule 68 offer was more favorable than the judgment" solely on a citation to a treatise. App., *infra*, at 14a, *citing* Charles Alan Wright, *et al.*, 12 FEDERAL PRACTICE & PROCEDURE Sec. 3006.1, 129 (2d Ed. 1997). The treatise erroneously relies on cases that apply the general *contra preferendum* rule of construction to hold that ambiguities in a Rule 68 offer should be construed against the offeror; none of those cases addresses the allocation of the burden of proof as to the value of non-monetary relief. *Id.*

Placing the burden of proof on the offeree is supported by the language and policies of Rule 68. It is also consistent

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[10] *See RCA/Ariola Intern'l v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1998); *Local 32B-32J, Service Employees Int'l Union, AFL-CIO v. Port Authority of New York and New Jersey*, 180 F.R.D. 251, 253 (S.D.N.Y. 1998); *Stokes v. City of Montgomery, Ala.*, 157 F.R.D. 514, 517-18 (M.D.Ala. 1994); *BIC Leisure Products, Inc.*, 850 F.Supp. at 229; *Domanski*, 149 F.R.D. at 558; *Lish*, 148 F.R.D. at 520; *Real*, 653 F. Supp. at 739.

with the allocation of the burden of proof in both civil cases in general and applications for attorney's fees in particular.

The language of Rule 68 states in material part: "[I]f the judgment finally obtained by the offeree is not more favorable than the offer." The use of the negative suggests that the offeree must show that the judgment is more favorable than the offer.[11]

The allocation of the burden to the offeree better effectuates the purpose of Rule 68, which, as stated by this Court, is to encourage settlements of disputes by requiring "plaintiffs to 'think very hard' about whether continued litigation is worthwhile." *Marek*, 473 U.S. at 11. The plaintiff-offeree has greater knowledge than the defendant of the scope of the relief he will seek. The plaintiff has to place a value on the non-monetary relief he seeks at the time a monetary Rule 68 offer is made in order to determine if it is worthwhile to continue litigation. Once the plaintiff rejects an offer, he knows that the value of non-monetary relief he may obtain will be an issue at the attorney's fees phase of the case, and he may seek discovery of facts that are material to the value of such relief. These considerations make it both fair and appropriate to require the plaintiff-offeree to prove that a judgment is more favorable than a rejected offer.

Placing the burden of proof on the offeree accords with the usual allocation of the burden of proof in civil cases. The plaintiff in a civil case typically bears the burden of proving liability, and as the proponent of the relief requested also bears the burden of justifying non-monetary relief. Once a valid Rule 68 offer is rejected, the value of the non-monetary

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[11] *See* Wright, *et al.*, 12 FEDERAL PRACTICE & PROCEDURE Sec. 3006.1, at 129 (acknowledging that this language "suggest[s] that the burden to show that the judgment is more favorable should be on the plaintiff..." but, as discussed above, asserting that the burden should be on the offeror).

relief that the plaintiff is seeking becomes an additional element of what the plaintiff must ultimately prove to obtain costs from the court. Imposing the burden of proof on the plaintiff-offeree with respect to the value of reinstatement is no more burdensome than imposing the burden on the plaintiff to prove the amount of front pay in the event reinstatement is denied,[12] or to prove any other element of equitable relief or damages.

Moreover, a party seeking an award of attorney's fees unquestionably bears the burden of proof with regard to the amount of fees to be awarded. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984) (placing the burden on the party seeking attorney's fees to establish reasonable hourly rates with "satisfactory evidence . . ."). When a statute authorizes an award of attorney's fees as an element of costs, a rejected Rule 68 offer may limit an award of post-offer attorney's fees. *See Marek*, 473 U.S. at 9. Thus, the elements of entitlement to an award of attorney's fees after a valid Rule 68 offer is declined include demonstrating that the judgment is more favorable than the offer. An offeree who seeks attorney's fees should therefore have the burden of proving that a non-monetary judgment is more favorable than a monetary offer.

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[12] *See, e.g., McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992) (affirming the denial of a front pay award where plaintiff failed to provide a basis for calculating an appropriate award: "when a party fails to provide the district court with the essential data necessary to calculate a reasonably certain front pay award, the court may deny the front pay request").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 27, 2006

APPENDIX A: Opinion of the court of appeals, dated July 20, 2006.

APPENDIX B: Memorandum opinion of Magistrate Judge, dated September 10, 2004.

APPENDIX C: Order of the court of appeals, dated September 29, 2006.

APPENDIX D: F.R. Civ. P. 68.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 20, 2006

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 04-5420-CV.

John REITER,

Plaintiff-Appellant,

v.

MTA NEW YORK CITY TRANSIT AUTHORITY,

Defendant-Appellee,

Metropolitan Transportation Authority of the State of New York and Mysore L. Nagaraja, Senior Vice President and Chief Engineer,

Defendants.

Argued: Aug. 26, 2005.

Decided: July 20, 2006.

Before SACK, KATZMANN, and B.D. PARKER, Circuit Judges.

B.D. PARKER, Circuit Judge.

Appendix A

Plaintiff-Appellant John Reiter appeals from a judgment of the United States District Court for the Southern District of New York (Gorenstein, *M.J.)* limiting attorneys' fees under Rule 68.[1] The award followed a trial on a claim of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Reiter sued Defendant-Appellee MTA New York City Transit Authority ("NYCTA") for monetary and equitable relief, principally seeking compensatory damages plus restoration to the job from which he had been demoted. After the litigation started, the NYCTA served an Offer of Judgment for $20,001 (the "Offer") under Rule 68. The Offer, however, made no mention of equitable relief. The case proceeded to trial and the jury awarded Reiter $140,000. The district court then awarded Reiter substantial equitable relief, the most prominent feature of which was his restoration to his job. *Reiter v. Metro. Transp. Auth.,* 2003 WL 22271223, at *14 (S.D.N.Y. Sept.30, 2003). But the district court also granted the NYCTA's motion for a new trial conditioned on Reiter's agreement to accept a remittitur to $10,000. *Id.* at * 16.

Reiter agreed to accept that amount and the parties agreed to permit a magistrate judge to determine attorneys' fees in the light of Reiter's success and NYCTA's Offer. This task required the magistrate judge to compare the monetary relief with the equitable relief Reiter secured. After that comparison, the magistrate judge concluded that the equitable relief did not have "any significant value" and that the final monetary award was less than the Offer. The court then

1. The parties consented to jurisdiction by a magistrate judge for resolution of the motions for attorneys' fees. *See* 28 U.S.C. § 636(c)(1).

awarded Reiter only pre-Offer attorneys' fees. Since this conclusion was clearly erroneous, we reverse. We also remand so the court can consider additional factors related to the calculation of attorneys' fees.

Background

The NYCTA provides public transportation in New York and is comprised of several departments, including the Capital Program Management ("CPM") department, which is responsible for major architectural and engineering projects. In 1999, Reiter was employed by NYCTA as Deputy Vice President of Engineering Services ("DVP Engineering"), making him the head of the Engineering Services Department. That Department, which was part of the CPM, was responsible for major NYCTA engineering projects. As DVP Engineering, Reiter was one of thirteen senior-level executives who reported directly to the Senior Vice President and Chief Engineer of CPM, and the position required Reiter to be a licensed engineer or architect. The Department had an annual budget in excess of one billion dollars.

As DVP Engineering, Reiter earned around $119,000 per year. Eight senior executives reported directly to him and he exercised supervisory responsibility over 900 employees. As a perquisite of the position, Reiter had a large, prominent corner office on the seventh floor (near his staff) with a front view of Manhattan and a confidential secretary who was among the most experienced secretaries in the organization. The NYCTA's salary and compensation structures are based on the "Hay Points" system, which ranks the importance and difficulty of various positions. Hay Points are essentially an

objective measure of a position's value in terms of responsibility, complexity and salary. In his position, Reiter was given 1560 Hay Points-a relatively large amount-to reflect his responsibilities and salary.

In January 2000, Reiter received a negative annual performance review and was rated as a marginal employee. Reiter disagreed with the evaluation and filed several complaints through the internal appeals process and with the Equal Employment Opportunity Commission ("EEOC"), alleging that he received the negative evaluation as retaliation because his wife, who also worked for the NYCTA, had filed separate EEOC charges alleging discrimination and harassment.

In June 2001, Reiter was demoted. He was transferred to the position of Deputy Vice President of Technical Services ("DVP Technical"). The Technical Services Department was responsible for working with the customers of CPM on the acceptance of capital projects. Its role was to ensure that capital projects built by Engineering Services could be used by customers and were capable of being maintained by Engineering Services over time. Reiter contended that the transfer was both retaliatory and a substantial demotion.

He pointed out that as DVP Engineering, he had supervisory responsibility for 900 employees and eight executives directly reported to him. As DVP Technical, he had no staff and no direct reports. While Engineering Services was the largest department within CPM, with roughly 60% of its workforce, Technical Services was one of the smallest departments, with approximately ten employees. Moreover,

Reiter testified that in his new position he had no specifically assigned responsibilities or functions and did not have enough projects to fill his work day. While Engineering Services oversaw the development and implementation of large capital projects, Technical Services essentially ensured that the projects completed by Engineering Services were used and maintained. Moreover, in his new position, Reiter reported to the Vice-President of Technical Services, not to senior management of CPM as he done as DVP Engineering. The new position did not require that Reiter be a licensed architect or an engineer. In addition, Reiter's demotion resulted in the loss of a number of substantial perquisites. He lost his confidential secretary, was moved from his large corner office on the seventh floor with a front view of Broadway to a small, less desirable one on the second floor with a view of an alley, and lost all of his Hay Points.

In April 2001, Reiter sued the NYCTA. His complaint alleged that he was subject to retaliation-in the form of verbal reprimands, negative performance reviews, and demotion-for filing his initial EEOC charge in March 2000. By way of relief, Reiter sought compensatory damages as well as equitable relief. Specifically, he alleged that he was entitled to return to his prior position, along with all of the benefits of that position.

In July 2001, defendants made an Offer of Judgment under Rule 68. In it they proposed allowing judgment to be taken against them in the amount of $20,001, "together with costs and reasonable attorneys fees accrued in this litigation to date." The Rule 68 Offer ignored the non-monetary relief Reiter had sought. Reiter did not accept the Offer and the

case proceeded to trial with the jury deciding liability and compensatory damages and the court addressing equitable relief.

Following a six-day trial, the jury returned a verdict in favor of Reiter, finding that NYCTA unlawfully retaliated against him for filing an EEOC complaint and awarded him $140,000 in compensatory damages for emotional suffering. After the verdict, the NYCTA moved to vacate the award on the ground that Reiter had failed to present sufficient evidence of emotional distress. *See* Fed.R.Civ.P. 50. In the alternative, the NYCTA moved for a new trial or for a remittitur reducing the award to $5,000-$10,000. *See* Fed.R.Civ.P. 59(a) & (e).

While opposing these motions, Reiter continued to pursue equitable relief, seeking, among other things, reinstatement to his former position with the restoration of various perquisites of his job and an injunction against future retaliation. Reiter also sought back pay, front pay, and pre- and post-judgment interest.

Ultimately, the court denied the defendant's motion for judgment as a matter of law but agreed to a new trial unless Reiter accepted $10,000. Reiter accepted the remittitur and ultimately received that amount. Judge Koeltl granted Reiter equitable relief. He ordered Reiter reinstated to his former position of DVP Engineering, with an office comparable to the one he had prior to the demotion, the return of a confidential secretary and the restoration of lost Hay Points. The parties then consented to have Reiter's request for attorneys' fees resolved by a magistrate judge.

Appendix A

Before the magistrate judge, Reiter sought substantial attorneys' fees at a rate of $350 per hour for two attorneys and $125 per hour for one attorney and court costs. NYCTA, on the other hand, contended that its Offer cut off attorneys' fees and costs incurred after the Offer.

Ultimately, the magistrate judge agreed with the NYCTA and denied Reiter fees and costs incurred after the Rule 68 Offer. *Reiter v. Metro. Transp. Auth.*, 224 F.R.D. 157, 159 (S.D.N.Y.2004). He noted that the monetary award was less than the amount in the Offer and then proceeded to completely discount the equitable relief that Judge Koeltl had awarded on the ground that none "of the various injunctive elements of the final judgment [had] any significant value." *Id.* at 169. Specifically, the court concluded that Reiter's reinstatement to his former position, responsibilities, and status, was "of limited value," and "the restoration of Hay Points had no practical or economic significance." *Id.* at 168. The court also concluded that the value of a confidential secretary and desirable office space "was minimal, if anything." *Id.* at 168-69. Based on plaintiff's failure to accept NYCTA's "more favorable" monetary Offer of $20,001, the magistrate judge ruled that Reiter was foreclosed from post-Offer attorneys' fees and costs. He summarized his thinking as follows:

> While the Court has discussed the value of each element of the final judgment separately, Rule 68 requires a comparison of the entire final judgment against the entire Offer. But stripped of the vindication value that might be attributed to Reiter's gratification in having obtained what he

> sought in a final judgment, the equitable elements of the final judgment together are of such limited value that the Court can only conclude that they would not be considered more favorable by an objective, reasonable person than a $10,001 cash payment. As a result, Reiter must bear any costs or fees he incurred after the making of the Offer.

Id. at 169.

Having found that Reiter could not recover fees incurred subsequent to the Offer, the magistrate judge proceeded to calculate pre-Offer attorneys' fees and costs as $17,075.42. *Id.* Reiter's counsel sought compensation at $350 per hour for senior counsel and $150 per hour for junior counsel, arguing that these were the prevailing rates for experienced Title VII lawyers in the Southern District of New York. The court relied primarily on the retainer agreement rate, rather than prevailing current market rates, concluding that the amount actually charged by counsel was a dispositive indicator of a reasonable rate. Since Reiter's retainer agreement called for $175 per hour for in-office work and $200 for out-of-office work, the district court awarded $200 per hour to Reiter's two lead attorneys. *Reiter v. Metro. Transp. Auth.*, 2004 WL 2072369, at *8 (S.D.N.Y. Sept. 10, 2004). The court decreased the retainer rate to $125 per hour for Reiter's third attorney because she was less experienced. *Id.* at *7.

Reiter moved for reconsideration, arguing that higher hourly rates should apply based on the current market rates. The court based its determination on the plaintiff's retainer-

based rate and rejected counsel's contention that he had not had a fair opportunity to prove customary rates. According to the magistrate judge's reasoning, Judge Koeltl's ruling that counsel provide to NYCTA only a copy of plaintiff's retainer agreement did not mean that its terms would be dispositive and "in no way prevented plaintiff's counsel from providing evidence of their customary rate in support of the attorney's fees application."

This appeal followed.

DISCUSSION

Reiter principally raises two issues on appeal. First, he contends that the court below improperly denied attorneys' fees incurred after the Offer. Second, to the extent it awarded fees, he claims the court erred by not applying prevailing market rates. We review *de novo* a district court's interpretation of the Federal Rules of Civil Procedure, *Unicorn Tales, Inc. v. Banerjee,* 138 F.3d 467, 469 (2d Cir.1998), and review for clear error any findings of fact. *Id.* Further, we review a court's decision to award or deny attorneys' fees for abuse of discretion and its calculation of those damages *de novo. Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,* 302 F.3d 18, 26 (2d Cir.2002).

First, Reiter contends that the district court erred when it denied attorneys' fees and costs incurred after the Offer because the equitable relief he obtained, along with the $10,000 monetary award, was more favorable than the Offer. We agree. Rule 68 is a cost-shifting rule designed to encourage settlements without the burdens of additional

litigation. Rule 68 provides: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Fed.R.Civ.P. 68. The Rule thus requires a court to compare the offer to the judgment and decide which is more favorable. The magistrate judge, undertaking that exercise, concluded that the Offer was more favorable than the judgment. The principal basis for this result was his conclusion that none of the equitable relief Judge Koeltl granted to Reiter had any significant value and that no reasonable person would value the relief more than a $10,001 cash payment. *Reiter,* 224 F.R.D. at 169. This conclusion is clearly erroneous. Its most conspicuous shortcomings are that it: (1) fails to appreciate the significance of equitable relief in civil rights litigation, and (2) draws indefensible conclusions about the worthlessness of the equitable relief Reiter obtained.

Turning to the question of whether Reiter's reinstatement had any value, we note that equitable relief lies at the core of Title VII, which expressly provides for non-monetary relief such as "reinstatement" and "hiring." 42 U.S.C. § 2000e-5(g). In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court commented that:

> the purpose of Title VII[is] to make persons whole for injuries suffered. . . . This is shown by the very fact that Congress took care to arm the Courts with full equitable powers. For it is the historic purpose of equity to secure complete justice . . . Where federally protected rights have been invaded, it has been the rule from the beginning that courts

> will be alert to adjust their remedies so as to grant the necessary relief.

Id. (internal quotation marks, citations, and alterations omitted).

Under Title VII, equitable relief is not incidental to monetary relief. We, as well as other circuits, have repeatedly emphasized the importance of equitable relief in employment cases. *See Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 170 (2d Cir.2002) (noting that under Title VII reinstatement has been interpreted as the first choice); *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir.1982) (reinstatement required "except in extraordinary cases"); *Williams v. City of Valdosta*, 689 F.2d 964, 977 (11th Cir.1982) (reinstatement is a remedy to which plaintiff "is normally entitled . . . absent special circumstances"); *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir.1989) (reinstatement "is ordinarily to be granted") (emphasis omitted). Under Title VII, the best choice is to reinstate the plaintiff, because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct. *Brooks*, 297 F.3d at 170 (citing *Selgas v. Amer. Airlines*, 104 F.3d 9, 12 (1st Cir.1997)). *See also Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir.2003) ("We have recognized that reinstatement is an important remedy because it most efficiently advances the goals of Title VII by making plaintiffs whole while also deterring future discriminatory conduct by employers.") (internal quotation marks omitted). By misapprehending the significance of the equitable relief Reiter obtained, the magistrate judge significantly under-valued what Reiter lost

and what he was able to recover in litigation. As the Eleventh Circuit has noted in an analogous context:

> When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored. . . . We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights. If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights.

Allen, 685 F.2d at 1306. These factors underpin the overarching preference in employment discrimination cases for reinstatement. *See NLRB v. Thalbo Corp.,* 171 F.3d 102, 110 (2d Cir.1999) (finding "the responsibility of a court that finds a [Title VII] violation is to fashion equitable relief to make the claimant whole"); *see also Northcross v. Bd. of Educ. of the Memphis City Sch.,* 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (construing attorney's fees provisions in civil rights statutes to be justified where plaintiffs injured by discrimination are successful in obtaining injunctive relief). "Reinstatement advances the policy goals of make-whole relief and deterrence in a way which money damages cannot." *Squires v. Bonser,* 54 F.3d 168, 172-73 (3d Cir.1995).

Appendix A

Having rather easily concluded that the equitable relief Reiter secured was of considerable importance under Title VII's overall remedial framework, we now turn to the more difficult issue of whether that relief-the return of his old job-was worth more than $10,000. We recognize that "it is difficult to compare monetary relief with non-monetary relief." 12 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3006.1, 127 (2d ed.1997). Justice Brennan described this problem best by stating: "[I]f a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success." *Marek v. Chesny,* 473 U.S. 1, 32, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Brennan, J., dissenting). At least one court has suggested that this inherent difficulty counsels in favor of disregarding equitable relief for Rule 68 purposes. *See Real v. Cont'l Group, Inc.,* 653 F.Supp. 736, 739 (N.D.Cal.1987) (concluding that "the better course is to compare monetary awards only").

However, we are not convinced that the difficulty of comparing a monetary offer and judgment that includes non-monetary elements means that Rule 68 should not be applied in such cases. Nothing in the language of Rule 68 suggests that a final judgment that contains equitable relief is inherently less favorable than a Rule 68 offer that contains monetary relief. As the Sixth Circuit has noted, in the Rule 68 context "a favorable judgment and an injunction can be more valuable to a plaintiff than damages." *Andretti v. Borla Performance Indus. Inc.,* 426 F.3d 824 (6th Cir.2005). Most federal courts adopt this approach. *See, e.g., Liberty Mut.*

Ins. Co. v. EEOC, 691 F.2d 438, 439, 442 (9th Cir.1982) (considering offer of judgment consenting to an injunction against disclosure of information under Rule 68); *Lish v. Harper's Magazine Found.,* 148 F.R.D. 516, 520 (S.D.N.Y.1993) (considering judgment's grant of authorial right to control publication and judicial determination of copyright violation); *Lightfoot v. Walker,* 619 F.Supp. 1481, 1485-86 (S.D.Ill.1985) (considering offer of judgment consenting to prison health care reform). *See* Thomas L. Cubbage III, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread,* 70 Tex. L.Rev. 465, 475 (1991) (surveying court decisions involving the application of Rule 68 to equitable relief and articulating a set of criteria for evaluating the favorableness of equitable offers and judgments). We follow this approach and decline to disregard equitable relief for Rule 68 purposes.

In determining the value of the relief, the defendant bears the burden of showing that the Rule 68 offer was more favorable than the judgment. *See* Wright § 3006.1 ("Rule 68 is actually a tool for defendant to use, and defendant alone determines the provisions of the offer. Since defendant has drafted those provisions, the courts generally interpret the offer against the defendant. Consistent with that, the burden should be on defendant to demonstrate that those provisions are in fact more favorable than what plaintiff obtained by judgment.") Here, the NYCTA failed to carry that burden. Its Offer proposed only the amount of $20,001. It failed to confront Reiter's request for equitable relief and was conspicuously silent as to whether Reiter would remain demoted, in a self-evidently inferior position. The magistrate judge, in the face of this omission, concluded that the

equitable relief was essentially valueless and, in any event, would not be regarded by any reasonable person as worth more than $10,000.

Readily acknowledging the difficulties posed by a comparison of monetary and equitable relief, we are still confounded by this conclusion. As DVP Engineering, Reiter shared high-level executive responsibility for the NYCTA's major architectural and engineering projects. The budget of his department exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion to DVP Technical, he had no staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest departments with ten employees. The magistrate judge found these differences "of limited value" and concluded that no objective, reasonable person would prefer the more important job to a $ 10,000 cash payment. While the difference cannot be quantified with precision, we nonetheless think that the opposite is true. Reiter was a highly compensated, senior executive in one of the world's largest and most important public transportation agencies. For him, as for many who occupy such positions after long years of service, the personal satisfaction and sense of gratification and achievement derived from first being given, and then bearing, significant professional responsibilities cannot be understated. A powerful indication that such responsibilities are coveted is that Reiter spent years of litigation to regain them.

We have no difficulty concluding that any senior executive worthy of the title (who is rational and who is still

anxious for responsibilities) would, at a moment's notice, exchange a job with no staff, no budget, no direct reports, and a work force of ten for a job with 900 employees and eight senior direct reports in a department with a billion-dollar budget. Further, we have no difficulty opining that any such rational executive would more likely than not jump at the chance if it were priced at just $10,000-an amount totaling less than 10% of a single year's salary. In sum, while monetizing equitable relief will, in many instances, pose vexing problems (ones we leave for another time) we have little difficulty concluding that Reiter ultimately recovered more than the Offer and that, consequently, it did not cut off his entitlement to post-Offer attorneys' fees.

Next, plaintiff contends that the award should be increased because the district court failed to apply the current market hourly rate for the Southern District of New York. In determining reasonable attorney's fees, a district court must calculate a lodestar figure based upon the number of hours reasonably expended by counsel on the litigation multiplied by a reasonable hourly rate. *Blanchard v. Bergeron,* 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989). The lodestar figure should be based on market rates "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). It is well-established that the prevailing community a district court should consider to determine the lodestar figure is normally "the district in which the court sits." *Polk v. N.Y. State Dep't of Corr. Servs.,* 722 F.2d 23, 25 (2d Cir.1983). *See also A.R. v. N.Y. City Dep't of Ed.,* 407 F.3d 65, 79 (2d Cir.2005) (engaging in extensive

discussion as to whether in that case the "prevailing rates in the district in which the court [sat]" should have been applied). The rates used by the court should be " 'current rather than historic hourly rates.' " *Gierlinger v. Gleason,* 160 F.3d 858, 882 (2d Cir.1998) (quoting *Missouri v. Jenkins,* 491 U.S. 274, 284, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989)); *see also Cohen v. W. Haven Bd. of Police Comm'rs,* 638 F.2d 496, 506 (2d Cir.1980) ("[F]ees that would be charged for similar work by attorneys of like skill in the area should [be] the starting point for determination of a reasonable award.").

In this case, the magistrate judge found that $200 per hour was a reasonable rate for two attorneys, using the hourly rate set forth in Reiter's attorneys' retainer agreement ($175), and increasing it by $25 per hour to adjust for inflation. *Reiter,* 2004 WL 2072369, at *8. By referring to the retainer agreement, the court also found the hourly rate of $125 to be appropriate for the junior attorney. *Id.* at *7. This approach was erroneous. The record indicates that Reiter's attorneys set the retainer rate because, in part, they were offering a discount to a plaintiff in a civil rights case. The magistrate judge failed to give appropriate weight to this explanation. Important public policy considerations dictate that we should not punish an "under-charging" civil rights attorney. *See Getty Petroleum Corp. v. Bartco Petroleum Corp.,* 858 F.2d 103, 114 (2d Cir.1988) (holding that an award of attorney fees may be assessed at a rate greater than the rate in a fee agreement). The Supreme Court in *Blum* also noted that courts "must avoid [.] . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." *Blum,* 465 U.S. at 895, 104 S.Ct. 1541. Thus, the

magistrate judge should have taken into account the current market rate in the Southern District of New York. Accordingly, we also vacate the fee award and remand for additional consideration of the rate " 'prevailing in the [Southern District] for similar services by lawyers of reasonably comparable skill, experience, and reputation.' " *Farbotko v. Clinton County,* 433 F.3d 204, 210 (2d Cir.2005) (quoting *Blum,* 465 U.S. at 896 n. 11, 104 S.Ct. 1541).[2]

CONCLUSION

For the foregoing reasons, we affirm in part and reverse and remand in part for further proceedings consistent with this opinion. We take this opportunity to express our concern over the current formulation of Rule 68 and to recommend to the Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure of the Judicial Conference of the United States that they address the question of how an offer and judgment should be compared when non-pecuniary relief is involved. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil*

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2. We find no merit in Reiter's contention that the district court erred in eliminating 8.1 hours based on what he describes as a clerical error in his time records. The court subtracted 8.1 hours from the request of Reiter's counsel because the summary indicated that he had spent 9 hours drafting discovery demands on a particular day, but the contemporaneous time records showed that he had expended only 0.9 hours that day on the task. Because Reiter never presented an explanation for this time record discrepancy prior to the district court's decision and there were no circumstances warranting reconsideration, we find no abuse of discretion in the district court's elimination of those hours.

Procedure, et al., 98 F.R.D. 337, 363 (1983) (rejecting proposals to amend Rule 68 to give the district courts discretionary power to refuse to award costs in some circumstances); *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, et al.*, 102 F.R.D. 407, 432-438 (1984) (same). The Clerk is directed to send copies of this opinion to the Chairman and Reporter of the Judicial Conference Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 10, 2004

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 01 Civ. 2762(GWG)

Sept. 10, 2004

John REITER,

Plaintiff,

v.

METROPOLITAN TRANSPORTATION AUTHORITY OF the State of NEW YORK, MTA New York City Transit, and Mysore L. Nagaraja, P.E., Individually and as Senior Vice President and Chief Engineer,

Defendants.

OPINION AND ORDER

GORENSTEIN, United States Magistrate Judge.

Plaintiff John Reiter brought this action in April 2001 against his employer, the New York City Transit Authority ("NYCTA"); his former supervisor, Mysore L. Nagaraja; and the Metropolitan Transportation Authority of the State of New York seeking damages and injunctive relief for allegedly

discriminatory and retaliatory conduct that he suffered as an employee of the NYCTA. On July 27, 2001, the NYCTA served Reiter with an Offer of Judgment pursuant to Fed.R.Civ.P. 68 in the amount of $20,001 plus reasonable attorney's fees and court costs incurred through that date. Reiter did not accept the Offer.

The case proceeded to a jury trial in January 2003, with the NYCTA as the sole remaining defendant. The jury returned a verdict in Reiter's favor and awarded him $140,000 in compensatory damages. Following the NYCTA's post-trial motion for remittitur pursuant to Fed.R.Civ.P. 59(e), however, the court held that the jury's award of damages was excessive and that it would order a new trial on the issue of damages unless Reiter agreed to a remittitur reducing the award to $10,000. Reiter agreed to the remittitur.

Reiter has now applied for an award of attorney's fees in the amount of $457,155 and court costs in the amount of $12,090.72. The parties have consented to disposition of the application by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1). While not disputing that Reiter is entitled to reasonable attorney's fees and court costs, the NYCTA maintains that its Offer of Judgment cut off Reiter's right to such fees and costs incurred after the date the Offer was made. For the reasons stated below, the Court agrees that Reiter is not entitled to reimbursement from the NYCTA of such fees and costs. As described in a separate decision issued this date, Reiter's reasonable attorney's fees and court costs up to and including the date of the Offer are $17,075.42 and thus he is entitled to a judgment for this amount only.

Appendix B

I. *INTRODUCTION*

A. *Factual Background*

The facts underlying this case are set forth in *Reiter v. Metropolitan Transportation Authority,* 2003 WL 22271223, at *3-*6 (S.D.N.Y. Sept.30, 2003). In brief, the NYCTA provides public transportation in New York and is comprised of several departments, including Capital Program Management ("CPM"), which is responsible for major architectural and engineering projects. (Reiter: Tr. 49).[1] In 1999, Reiter was employed by the NYCTA as Deputy Vice President of Engineering Services ("DVP Engineering") at an annual salary of $118,728. (Reiter: Tr. 46-47, 183, 278). The Engineering Services department was responsible for major NYCTA engineering projects, had an annual budget in excess of one billion dollars, and comprised approximately 900 staff members. (Reiter: Tr. 46-47, 49, 78-82, 129-30, 139, 150). As the head of Engineering Services, Reiter reported directly to the Senior Vice President and Chief Engineer of CPM. (Reiter: Tr. 47, 50, 52; Nagaraja: Tr. 396, 449).

On January 31, 2000, Reiter received his annual performance review, which gave him a rating of "marginal." (Reiter: Tr. 92, 107-08). On March 25, 2000, Reiter filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that he received the "marginal" review in retaliation for his wife bringing her

1. "Tr." refers to pages of the trial transcript (Docket # 72).

own EEOC charge against the NYCTA alleging discrimination and harassment. (Reiter: Tr. 98-100, 118-20).

On June 1, 2000, Reiter was transferred to the position of Deputy Vice President of Technical Services ("DVP Technical"). (Reiter: Tr. 120, 149- 50). The Technical Services department was responsible for working with the customers of CPM on the acceptance of capital projects. (Carter: Tr. 372; Nagaraja: Tr. 470-71). Its role was to ensure that capital projects built by CPM could be used by customers and were capable of being maintained by them. (Carter: Tr. 372; Nagaraja: Tr. 470-71). In his new position Reiter retained the same title of Deputy Vice President, the same fringe benefits, and the same salary as before the transfer. (Reiter: Tr. 273; Nagaraja: Tr. 471). He received positive evaluations for his 2000 and 2001 employment reviews and also received the standard three percent annual raise in 2001 and 2002, giving him a total annual salary of $125,956. (Reiter: Tr. 267-70, 279- 80).

The Technical Services department, however, was relatively small (10 or 11 employees) and according to Reiter played a less critical role within CPM compared with the Engineering Services department. (Reiter: Tr. 78-82, 150). Reiter contrasted the two positions as follows:

> The title may sound the same but engineering services and technical services are worlds apart in many respects. One of the requirements for heading up engineering services is to be a licensed engineer or a licensed architect, for instance. That is not a requirement to head up technical services.
>
> . . . .

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> And [DVP Engineering] was a division head, meaning reported directly to the head of the department. [DVP Technical] was not a division head. I mean, I reported to someone else who reported to the department head. In engineering services I had overall responsibility for 900 people. In technical services I had no staff. Technical services in total is only about ten or 11 people. None of them reported to me. I had no written job description. The managerial position questionnaire, which was the job description for [DVP Engineering], no such thing existed for the assignment that I was given in technical services.

(Reiter: Tr. 150).

Reiter testified that his transfer from DVP Engineering to DVP Technical was the equivalent of a demotion for several reasons. First, he stated that he was transferred to a position that did not have any "Hay Points." (Reiter: Tr. 150, 181-82, 271). According to Reiter:

> The Hay Points System ranks the importance and/or difficulty of various positions. [(Reiter: Tr. 83)]. The salary and compensation structures are based on the Hay points system and by definition a lateral transfer is a transfer [from] a managerial position to a managerial or executive position with little or no change in Hay points. [(Reiter: Tr. 182-84)].

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Reiter, 2003 WL 22271223, at *4. Reiter went from having 1560 Hay Points as DVP Engineering to zero Hay Points as DVP Technical. (Reiter: Tr. 181-82). However, Reiter indicated that the position of DVP Technical "never had Hay points assigned to it" (Reiter: Tr. 181) because the position had only recently been created (Reiter: Tr. 150-51, 271-72). Second, whereas in his position as DVP Engineering Reiter had responsibility for the 900 staff members in the department (including seven or eight executives who directly reported to Reiter), as DVP Technical Reiter had no direct reports in a unit of 10 or 11 employees. (Reiter: Tr. 80-82, 150). Third, Reiter lost his "confidential secretary" when he was transferred and received the assistance of a secretary whom he felt was "not at all at the same level as the secretary that [he] had" as DVP Engineering. (Reiter: Tr. 151). Fourth, Reiter was moved from his corner office on the seventh floor to another office on the second floor. (Reiter: Tr. 152-54). Reiter explained the significance of this relocation as follows:

> Q. Now, what is significant about moving from the seventh floor to the second floor?
>
> A. Well, one of what I consider to be the most significant was the fact that technical services, which was the group I was now assigned to, was all located on the eighth floor and the elevators in the building are in banks that go to different floors and one bank goes to floors 1 through 5 and another bank goes from floors 5 through 9. So for me to see members of the group that I was assigned to I had to take an elevator from the second floor to the fifth floor, then get off the

elevator and then get on another elevator from the fifth floor to the eighth floor. It was a two-elevator ride.

. . . .

Q. And what about the office, how were your offices different from [DVP Engineering] to [DVP Technical]?

A. Well, my Engineering Services office was a corner office, located in the front of the building, which meant it looked out on Broadway, and it was approximately 240 to 250 square feet, had executive furniture, and all of that, and was large enough to have a conference table in it, okay. The office that I was moved to was about 170 square feet, different furniture, open book case instead of closed book case, that type of thing. Not, not large enough to have a conference table, there was no conference table, and looked out on—it's actually a one block street called Marketfield Street, but it [looks] like it's [a] dead end, looks like an alley, and you look out the window of the office and [it] looks like you're looking at some old run down tenements in an alley.

(Reiter: Tr. 152-54). Finally, Reiter testified that he had no specific assigned job responsibilities or functions as DVP Technical and did not have projects to keep him busy for an entire work day. (Reiter: Tr. 158-59).

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Beginning in November 2002, when the Vice President of Technical Services retired, Reiter took over the responsibilities of running the Technical Services department on a day-to-day basis. (Carter: Tr. 372, 385). His workload increased, he acquired eight direct reports, a "confidential secretary" was assigned to him, and he was given a new fourth-floor office. (Reiter: Tr. 277-78, 287; Carter: Tr. 385).

B. *The Complaint*

Reiter filed the original complaint in this action on April 2, 2001 and an amended complaint on July 5, 2001. The amended complaint raised claims under Title VII of the Civil Rights Act of 1964 alleging that Reiter was subject to retaliation in the form of verbal reprimands, negative performance reviews, and demotion because both he and his wife had complained of discrimination and filed complaints with the EEOC. *See* Amended Complaint, filed July 5, 2001 (Docket # 4) (reproduced as Ex. 3 to Affirmation of Steven M. Stimell in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs, filed March 3, 2004 (Docket # 104) ("Stimell Affirm.")), ¶¶ 13-22, 31. Reiter also contended that the defendants discriminated against him on the basis of race, in violation of Title VII and 42 U.S.C. § 1981, and on the basis of marital status, in violation of Title VII and the New York Human Rights Law. *See id.* ¶¶ 24-26, 31. In addition, the amended complaint alleged disparate treatment on the basis of race, gender, and marital status under Title VII. *See id.* ¶¶ 25, 31. Finally, Reiter alleged violations of 42 U.S.C. § 1983 and of his due process rights. *See id.* ¶¶ 1-2. The amended complaint sought compensatory and punitive damages and various forms of equitable relief. *See id.* at 10-11.

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Concerning his retaliation claim, Reiter alleged five principal instances of retaliation attributable to the EEOC complaints filed by him and his wife: (1) a negative oral evaluation in October 1999; (2) additional reporting obligations in December 1999; (3) the "marginal" performance review in January 2000; (4) his exclusion from a meeting that took place in January 2000; and (5) the June 1, 2000 transfer from DVP Engineering to DVP Technical. *See id.* ¶ ¶ 18-22.

C. *Offer of Judgment*

On July ~~27, 2001,~~ the NYCTA served Reiter with an Offer of Judgment under Fed.R.Civ.P. 68 in the amount of $20,001, "together with costs and reasonable attorneys [sic] fees accrued in this litigation to date." Offer of Judgment, dated July 27, 2001 ("Offer of Judgment" or "Offer") (reproduced as Ex. 1 to Stimell Affirm.), at 1; *see* Stimell Affirm. ¶ 2. Reiter did not accept the Offer of Judgment within the 10-day period required for acceptance, *see* Stimell Affirm. ¶ 2, and thus, under the terms of Fed.R.Civ.P. 68, the Offer was "deemed withdrawn."

D. *Pre-Trial Motions for Summary Judgment*

Following discovery, the parties moved for summary judgment pursuant to Fed.R.Civ.P. 56. On September 30, 2002, the court denied Reiter's motion for summary judgment in its entirety and granted defendants' motion for summary judgment dismissing all claims except Reiter's claim against the NYCTA that he was subjected to retaliation by being "demoted" in June 2000 from DVP Engineering to DVP

Technical because he had filed an EEOC complaint in March 2000. *See Reiter v. Metro. Transp. Auth.*, 2002 WL 31190167, at *5-*14 (S.D.N.Y. Sept.30, 2002). The court determined that there was "a genuine issue of material fact as to whether there was a causal connection between [Reiter's] filing of the March EEOC complaint and his June, 2000 transfer." *Id.* at * 11. All of Reiter's other claims were dismissed. *See id.* at *14.

E. *Trial*

The case was thereafter divided into legal and equitable issues, with the jury to make findings on the issues of liability and compensatory damages and with the court to order any equitable relief pursuant to 42 U.S.C. § 2000e-5(g)(1). *See Reiter,* 2003 WL 22271223, at *1. Following a six-day jury trial, on January 23, 2003 the jury returned a verdict in favor of Reiter and awarded him $140,000 in compensatory damages for pain and suffering. *See id.;* Tr. 691.

Concerning Reiter's requests for equitable relief, the court denied him back pay, front pay, restoration of vacation time, pre-judgment interest, and a permanent injunction to prevent the NYCTA from retaliating against him in the future. *See Reiter,* 2003 WL 22271223, at *14-*16. Reiter also requested "reinstatement" to the position of "Vice President of Engineering Services"— an "enhanced position" that was created by the NYCTA only after Reiter was transferred to DVP Technical. *See id.* at *11-*14. The court ordered that Reiter be reinstated not to this newly-created position but rather to his former position of DVP Engineering, with only the responsibilities he held prior to being transferred to DVP

Technical. *See id.* at *14, *16. The court ordered that Reiter's salary remain at its then-current level, which was $125,956, and that his Hay Point rating be set at 1560, the same as it was when he was transferred. *See id.* at *5, *14, *16. In addition, Reiter was awarded a "confidential secretary" and an office comparable to the one he had prior to the transfer. *See id.* at *14, *16. *See generally* Judgment, filed October 24, 2003 (Docket # 92) ("Judgment"), at 3.

F. *The NYCTA's Post-Trial Motions*

After the verdict, the NYCTA moved for judgment as a matter of law under Fed.R.Civ.P. 50(a) and to vacate the jury award under Fed.R.Civ.P. 50(b). *See Reiter,* 2003 WL 22271223, at *1. In the alternative, the NYCTA moved for a new trial pursuant to Fed.R.Civ.P. 59(a) or for remittitur pursuant to Fed.R.Civ.P. 59(e). *See id.*

On September 30, 2003, the court held that the jury's damages award of $140,000 was "shockingly excessive in light of the minimal evidence of actual emotional distress damages and the objective details of the retaliation." *Id.* at *8. The court further held that "an award for compensatory damages in excess of $10,000 would shock the judicial conscience." *Id.* at *11. Accordingly, the court granted the NYCTA's motion for remittitur pursuant to Fed.R.Civ.P. 59(e) and indicated that it would order a new trial on the issue of compensatory damages unless Reiter agreed to a remittitur reducing the award to $10,000, with post-judgment interest. *Id.* at *11, *15-*16. Reiter subsequently agreed to the reduced award. *See* Judgment at 3.

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G. *The Instant Motion*

Reiter has now moved for an award of $457,155 in attorney's fees—for 1713.30 hours of work performed by three attorneys who represented him during the proceedings—and $12,090.72 in court costs. *See* Motion for Attorney's Attorney's [sic] Fees and Costs, filed November 12, 2003 (Docket # 93). While not disputing that Reiter is entitled by statute to reasonable attorney's fees and court costs, the NYCTA maintains that its July 27, 2001 Offer of Judgment limits Reiter's fees and costs to those incurred up to and including the date the Offer was made. *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs, filed March 3, 2004 (Docket # 105), at 9-14. Reiter argues not that the Offer was ambiguous or otherwise invalid but rather that the final judgment of $10,000 combined with the equitable relief he received is more favorable than the $20,001 Offer. *See* Plaintiff's Memorandum of Law in Reply in Further Support of His Motion for Attorneys' Fees and Costs, filed May 3, 2004 (Docket # 112) ("Pl. Reply Mem."), at 3-11.

II. *APPLICABLE LEGAL PRINCIPLES*

42 U.S.C. § 2000e-5(k) provides that a "prevailing party" in an action under Title VII may recover, in the court's discretion, "a reasonable attorney's fee (including expert fees) as part of the costs." *See also, e.g., Am. Fed'n of State, County & Mun. Employees v. County of Nassau,* 96 F.3d 644, 650 (2d Cir.1996) ("An award of fees under Title VII is within the discretion of the trial court . . . ." (internal quotation marks and citation omitted)), *cert. denied,* 520 U.S. 1104,

117 S.Ct. 1107, 137 L.Ed.2d 309 (1997). The jury's verdict in Reiter's favor makes him a "prevailing party" and, because there are no "special circumstances" justifying a denial of fees, he is entitled to recover reasonable attorney's fees as part of the costs assessed against the NYCTA. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414-15, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Robinson v. Instructional Sys., Inc.,* 80 F.Supp.2d 203, 210 (S.D.N.Y.2000), *aff'd in part and vacated in part on other grounds,* 259 F.3d 91 (2d Cir.2001).

Fed.R.Civ.P. 68 provides that "[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party . . . to the effect specified in the offer, with costs then accrued." The purpose of this rule is "to encourage the settlement of litigation." *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 352, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981); *accord Marek v. Chesny,* 473 U.S. 1, 5, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) ("[Rule 68] prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits."). If the offer of judgment is rejected, Fed.R.Civ.P. 68 provides that "the offeree must pay the costs incurred after the making of the offer" if "the judgment finally obtained by the offeree is not more favorable than the offer." Because Title VII includes attorney's fees in its definition of costs, attorney's fees are also covered by the cost-shifting provision of Fed.R.Civ.P. 68. *See, e.g., Wilson v. Nomura Sec. Int'l, Inc.,* 361 F.3d 86, 89 (2d Cir.2004); *Lyte v. Sara Lee Corp.,* 950 F.2d 101, 103 (2d Cir.1991); *see also Marek,* 473 U.S. at 9, 105 S.Ct. 3012.

Therefore, if the final judgment is not "more favorable" than the offer of judgment, a prevailing plaintiff cannot recover attorney's fees and court costs for the period after the offer of judgment was made. *See, e.g., Marek,* 473 U.S. at 5, 9, 105 S.Ct. 3012; *Knoeffler v. Town of Mamakating,* 126 F.Supp.2d 305, 315 (S.D.N.Y.2000); *Christian v. R. Wood Motors, Inc.,* 1995 WL 238981, at *6 (N.D.N.Y. Apr.21, 1995).

III. *DISCUSSION*

A. *Law Governing Rule 68 and Equitable Relief*

The comparison of an offer and a final judgment for purposes of Rule 68 is simple when each consist of only a monetary award. Difficulties arise, however, if one or both of them incorporate equitable relief, such as an injunction or a declaratory judgment, because equitable relief is not susceptible of a ready comparison either with monetary relief or even with a differing form of equitable relief.

Despite these difficulties, when equitable relief is compared with equitable relief courts have typically arrived at some basis upon which to make a comparison. For example, in *Garrity v. Sununu,* 752 F.2d 727, 728-29, 732- 33 (1st Cir.1984), a disability discrimination class action against a state-run institution for the handicapped, the court found that the judgment obtained was more favorable than the Rule 68 offer by the state to provide certain services because the offer was indefinite and ambiguous, setting forth no dates for compliance, while the final judgment set forth specific dates by which the institution had to complete each

step for the restructuring of its services. *See also Local 32B-32J, Serv. Employees Int'l Union v. Port Auth. of N.Y. & N.J.,* 180 F.R.D. 251, 253 (S.D.N.Y.1998) (in action seeking right to protest at the World Trade Center plaza, judgment more favorable than offer because, *inter alia,* offer allowed only 18 demonstrators on plaza whereas judgment allowed at least 25 and prohibited exercise of discretion in the awarding of protest permits); *Lightfoot v. Walker,* 619 F.Supp. 1481, 1484-86 (S.D.Ill.1985) (in suit by prisoners regarding health care services, judgment more favorable than offer because of the greater benefits provided prisoners, such as a court-ordered medical examination of each prisoner, which was not provided for in the offer), *aff'd,* 826 F.2d 516 (7th Cir.1987); *Ass'n for Retarded Citizens of N.D. v. Olson,* 561 F.Supp. 495, 498-99 (D.N.D.1982) (in action challenging the conditions of confinement of mentally handicapped individuals, offer of various forms of equitable relief was not more favorable than a final judgment awarding solely equitable relief because, *inter alia,* the offer "contains caveats which make the dictates of the offer precatory rather than mandatory"), *aff'd as modified on other grounds,* 713 F.2d 1384 (8th Cir.1983), *cert. denied,* 519 U.S. 993, 117 S.Ct. 482, 136 L.Ed.2d 376 (1996); *cf. RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.,* 845 F.2d 773, 778, 780, 781 & n. 8 (8th Cir.1988) (judgment of $2500 in statutory damages plus an injunction was more favorable than offer of $2000 plus defendants' consent to an injunction because, in addition to the fact that "the money judgment [defendants] had offered was not as favorable as that [plaintiff] actually obtained," the offered injunction did not include certain relief afforded in the final injunction). *See generally Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co.,* 100 Hawai'i

97, 58 P.3d 608, 640 (2002) (Ramil, J., concurring) (surveying the case law—including *Marek, Garrity, Lightfoot,* and *Ass'n for Retarded Citizens of North Dakota*—and concluding that "in evaluating the favorableness of equitable relief, courts should consider" at least three factors—timeliness, comprehensiveness, and specificity—which the Court construes to be principles of "certainty").

Reiter's case, however, presents a far more difficult problem: not the comparison of two types of equitable relief alone—which at least have the potential of being judged on the same terms—but rather a comparison of two utterly different and unrelated forms of relief. Once the award of $10,000 is taken from both sides of the equation (that is, from both the offer and the final judgment), what is left is a comparison of a cash payment of $10,001 with the equitable relief granted to Reiter in the final judgment. Justice Brennan in a dissenting opinion foresaw the problem in making a comparison of this kind under Rule 68 in some circumstances when he noted that "it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success" where "a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief." *Marek,* 473 U.S. at 32, 105 S.Ct. 3012 (Brennan, J., dissenting).

Some courts faced with this situation have simply refused to make the comparison. For example, in *BIC Leisure Products, Inc. v. Windsurfing International, Inc.,* 850 F.Supp. 224, 228 (S.D.N.Y.1994), a patent infringement case, the defendant extended the plaintiff an offer of judgment of $2,000,000. Plaintiff rejected the offer and ultimately

recovered at final judgment $815,242.21 in royalties and equitable relief consisting of, *inter alia,* a permanent injunction preventing future patent infringement. *Id.* at 227-28. The court declined to consider at all the equitable relief awarded at final judgment for purposes of Rule 68, stating that there was "a serious question whether non-monetary relief may be included in computing the relative favorability of offer and judgment under Rule 68" and that "even if such relief is includable as an element of comparison, it is more than problematic as to how it should be valued." *Id.* at 229. Accordingly, the court held that the final judgment was not more favorable than the offer of judgment. *Id.*; *see also Spencer v. Gen. Elec. Co.,* 894 F.2d 651, 664 n. 21 (4th Cir.1990) (characterizing as a "thorny issue[ ]" whether "a court should try to compare pecuniary with non-pecuniary relief"), *overruled on other grounds by Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

Similarly, in *Real v. Continental Group, Inc.,* 653 F.Supp. 736, 738 (N.D.Cal.1987), the defendants extended a Rule 68 offer of $35,000 in back pay, $7000 in attorney's fees then accrued, and injunctive relief of reinstatement of the terminated plaintiff to his former position. After having declined the offer, the plaintiff ultimately consented to a remittitur of $50,000, with no equitable relief. *See id.* at 737-38. The defendants argued that the court should value the equitable relief of reinstatement (which, through expert testimony, defendants argued was valued at $300,000), add that value to the monetary figures in the Rule 68 offer, and then compare that sum to the ultimate judgment of $50,000. *See id.* at 738. The court declined to do so:

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> How does one quantify the value of injunctive relief?
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> . . . .
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> Although I find the defendants' contention to be plausible, I decline to apply it in the instant case. Defendants' theory raises the problem identified by Justice Brennan in his dissent to *Marek:* The *Marek* majority provides no guidance for assessing the value of nonpecuniary relief offered as part of a Rule 68 offer.
>
> The imprecision inherent in making such an evaluation for the purposes of the *Marek* comparison persuades me that, without more direction, the better course is to compare monetary awards only.

Id. at 738-39 (citation omitted). Because it valued the relief of reinstatement as zero, the court concluded that the plaintiff was entitled to attorney's fees accruing subsequent to the making of the offer. *See id.* at 739.

In contrast with *BIC Leisure Products* and *Real,* some courts have struggled to make the comparison on some basis. One treatise describes the difficulty of this exercise as involving a situation where "the courts must try to compare apples and oranges as best they can." 12 Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice and Procedure* § 3006.1, at 128 (2d ed.1997); *see* 13 James Wm. Moore, *Moore's Federal Practice* § 68.07(3), at 68-41 (3d

ed.2004) (indicating that "no sharply articulated approach has emerged in the cases to date"); *see also Jolly v. Coughlin,* 1999 WL 20895, at *7 (S.D.N.Y. Jan.19, 1999) ("The question of whether an offer of judgment is properly comparable to the judgment finally obtained must be decided on the individual facts of each case.").

The few cases undertaking the "apples" to "oranges" comparison have at least involved a comparison of a money offer with the award of something that could be characterized as a form of property right, albeit a non-tangible one. *Lish v. Harper's Magazine Foundation,* 148 F.R.D. 516, 519-20 (S.D.N.Y.1993), for example, concluded that a declaratory judgment of copyright infringement was more favorable than an offer of $250. Similarly, *Domanski v. Funtime, Inc.,* 149 F.R.D. 556, 557-58 (N.D.Ohio 1993), concluded that a judgment of $5581.90 and a permanent injunction against copyright infringement was more favorable than an offer of $9500. *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.,* 749 F.Supp. 331, 332-33 (D.Mass.1990), *aff'd in part and rev'd in part on other grounds,* 940 F.2d 744 (1st Cir.1991), viewed a judgment of $653,682, an injunction to retain certain franchises for a three-year period, and a rent freeze order as more favorable than a $700,000 offer. In these cases, the equitable relief in the judgment had some potential economic value—for example, the ability to operate a franchise or to make unfettered use of a copyright—making the equitable relief subject to a comparison on economic terms with the monetary relief in the offer. *See, e.g., id.* at 333 (plaintiffs "received very real benefits in the form of being allowed to retain their franchises for at least a three-year period"). In the instant case, however, neither party has

suggested that there was some special economic value to Reiter of the equitable relief contained in the final judgment.

In the end, case law provides virtually no guidance as to how equitable relief should be compared with monetary relief for purposes of the Rule 68 analysis. Indeed, as discussed, there is even support for the proposition that equitable relief should not be valued at all for purposes of Rule 68. *See, e.g., Real,* 653 F.Supp. at 738-39. While this Court doubts that such a broad rule is sustainable, it is not necessary to reach the question here because, as discussed below, even if the equitable relief obtained by Reiter is considered in the Rule 68 analysis, this relief combined with the $10,000 judgment is not more favorable than the Offer.

B. *Comparison of Reiter's Judgment with the Offer*

As noted, the issue in this case boils down to whether the equitable relief Reiter received in the final judgment is more favorable than a cash payment of $10,001. Reiter's argument is that "the value of an upgraded executive title and supervisory responsibilities for hundreds of employees and over one billion dollars in budgetary expenditures, combined with a corner office located on a high floor in Manhattan and a confidential secretary and status re-establishment of Hay Points is worth over $10,000.00." Pl. Reply Mem. at 11.

The final judgment reflects that Reiter's equitable relief entailed the following: (1) reinstatement to the position of DVP Engineering, with 1560 Hay Points and a salary at least at its then-current level; (2) a "confidential secretary"; and

(3) relocation to an office comparable to the office he had prior to the transfer to DVP Technical. *See* Judgment at 3. We address each element below.

First is reinstatement. Often, when reinstatement is awarded in employment discrimination cases, the plaintiff either is not working at the time of the judgment or is employed in a position with a lower salary. In such an instance—particularly where the plaintiff had no hope of independently obtaining a job with a salary equivalent to what the plaintiff received via the judgment—there may be a basis to determine that the reinstatement has a monetary value by means of a comparison between the reinstated salary and benefits and what the plaintiff would have been expected to earn in the absence of the judgment. Here, however, Reiter received absolutely no increase in salary or tangible employment benefits by being reinstated to DVP Engineering. Instead, his salary remained at its then-current level, which was actually higher than it was when he was originally transferred to DVP Technical. Accordingly, Reiter obtained no economic benefit whatsoever by being reinstated to DVP Engineering. Nor is there any evidence to support a potential claim that holding the DVP Engineering position would create some special economic benefit for Reiter in the future.

Reiter argues rather that there were certain non-economic benefits to reinstatement that must be considered for purposes of the Rule 68 analysis—specifically, he asserts that the DVP Engineering position carries superior "status" within the NYCTA, Pl. Reply Mem. at 5, as reflected by the number of direct reports, the placement of the office, and the importance of the job within the agency. *Id.* at 4-5.

The problem with this appeal to "status," however, is that there is simply no basis upon which to quantify it—or, more precisely, to compare a dollar figure (that is, $10,001) with the value of having a job with such superior "status," as Rule 68 requires. In addition, acquiring a job with superior "status" may be of great significance to some individuals, who might willingly pay money to obtain it, and absolutely meaningless to others, who would gladly take even a small amount of cash in exchange for giving up such status. Reiter's own personal evaluation of the value of such status cannot form part of the calculus, however, as Rule 68 would become unworkable if it were not based on an objective consideration of the relief awarded in the judgment with the relief contained in the offer. Moreover, any emotional distress that Reiter suffered as a result of the loss of status must be taken out of the calculus entirely, as his emotional distress from suffering the loss of status as well as of any other perquisites of the DVP Engineering job—such as the loss of a corner office or a "confidential secretary"—was compensated in full by the award of $10,000 in damages.

While the Court would be inclined to accord some monetary value to the superior status of the DVP Engineering position, including its various perquisites, it cannot say that it would be any great amount when considered from an objective observer's point of view. Moreover, the Court must also consider the time period for which Reiter acquired such status. This is not a case where the NYCTA is required by the judgment to keep Reiter in this position for even a single day past the entry of judgment. Indeed, the court's decision regarding equitable relief specifically noted that Reiter's job functions and direct reports "shall remain flexible and may

be changed for legitimate business reasons." *Reiter,* 2003 WL 22271223, at *14. While Reiter enjoys statutory protections from being fired for discriminatory or other improper reasons (as do virtually all employees), he could be fired at any time based on reasons of performance and could have his job altered for legitimate business reasons—as was true prior to his being transferred out of the DVP Engineering position. Thus, the Court must compare the value of being in the DVP Engineering job for some unknown period with the certainty of receipt of $10,001. Looking at the issue from the viewpoint of an objective, reasonable person, the Court concludes that, even accepting as true Reiter's assertions as to the job's superior "status," the enjoyment of such status is of limited value and certainly is not objectively more favorable than a $10,001 payment.

The case of *Stokes v. City of Montgomery,* 157 F.R.D. 514 (M.D.Ala.1994), is of no relevance here because the *Stokes* court was called upon to compare only reinstatement to one position with reinstatement to another position. While *Stokes* found the position secured by the judgment to be more favorable, *see id.* at 518, there was no monetary gap—here, $10,001—to be accounted for. Thus, the court in *Stokes* was never called upon to compare the objective value of the position awarded in the judgment with the objective value of the offered position and to then determine whether the difference exceeded some dollar amount. The cases relied upon by Reiter in his brief also do not alter the Court's conclusion. *Chestnut Hill Gulf, see* Pl. Reply Mem. at 8, determined that a judgment of $653,682, an injunction to retain 16 franchises for a three-year period, and a rent freeze order was more favorable than a $700,000 offer of judgment.

See 749 F.Supp. at 332-33. The court found that the plaintiffs had "received very real benefits in the form of being allowed to retain their franchises for at least a three-year period." *Id.* at 333. Although the court did not quantify this benefit, it certainly would appear that the economic value of retaining 16 franchises for a three-year period would be greater than the $46,318 difference between the offer and the final judgment. In *Domanski, see* Pl. Reply Mem. at 8-9, the court held that a judgment of $5581.90 and a permanent injunction against copyright infringement was more favorable than an offer of $9500. *See* 149 F.R.D. at 557-58. The court stated that "[t]his permanent injunctive relief, though admittedly difficult to quantify, adds considerable value" to the judgment because "[a]bsent injunctive relief, [the defendant] could have conceivably continued to infringe [the plaintiff's] copyright, making the recovery of $9500 in this one case practically worthless and certainly meaningless." *Id.* at 558 & n. 2. Thus, the $9500 offer of judgment meant nothing to the plaintiff unless it was also accompanied by permanent injunctive relief preventing the same type of copyright infringement in the future. Reiter's reinstatement, by contrast, does not prevent the status of that job from being altered through a change in job responsibilities or other perquisites. Nor does it prevent him from being terminated at any time in the future. Indeed, the judgment does not even provide court supervision over any claims of future unlawful retaliatory conduct by the NYCTA inasmuch as the court denied Reiter's request for a permanent injunction forbidding the NYCTA from retaliating against him. *See Reiter,* 2003 WL 22271223, at *15.

Appendix B

In *Lish,* the court concluded that a declaration that a copyright infringement had occurred as a result of the unauthorized publication of a letter was more favorable than an offer of judgment of $250, without any admission of liability. *See* 148 F.R.D. at 518-20. While the final judgment did not encompass a permanent injunction preventing future copyright infringement, the court found that the judicial determination of a copyright violation embodied in the final judgment conferred a "benefit" on the plaintiff because he could use the court's finding of a copyright violation in future cases. *Id.* at 520. Again, Reiter's reinstatement—while it might have some evidentiary significance in a future case—did not prevent or make unlawful a future firing from his job or a changing of his job responsibilities.

Reiter makes much of the fact that the reinstatement raised his Hay Point rating from zero to 1560—the level it was at when he was transferred to DVP Technical—and argues that the restoration of this "objective measure of a positions [sic] value in terms of responsibility, complexity, and salary," Pl. Reply Mem. at 4, makes the judgment more valuable than the Offer. *See id.* at 4-6, 11. In effect, Reiter's argument is that the restoration of what he feels is a measure of his seniority was a substantial and quantifiable economic benefit. But Reiter testified that the fact that DVP Technical "never had Hay points assigned to it" (Reiter: Tr. 181) was an indication only "that the position had never had a job description written for it and evaluated" since the position had only recently been created (Reiter: Tr. 150-51, 271-72). Moreover, Reiter's argument flies in the face of the fact that no change to his salary or benefits was effected by the restoration of his 1560 Hay Points. (*See generally* Reiter:

Tr. 273 ("Q. But the fact whether or not ... you have hay points or not hasn't affected your salary, has it not; isn't that correct? A. That's correct.")). Indeed, Reiter's salary actually *increased* during his tenure as DVP Technical, even though he never had any Hay Points throughout that entire period. (Reiter: Tr. 279-80). Thus, the restoration of the Hay Points had no practical or economic significance.

In the end, Reiter's reinstatement to the position of DVP Engineering, with the restoration of his 1560 Hay Points and the maintenance of his salary at least at its then-current level, does not make the injunctive portions of the final judgment more favorable than a $10,001 payment. The other equitable relief Reiter received does not alter this result. Although Reiter was awarded a "confidential secretary" comparable to the one he had prior to his transfer, *see* Judgment at 3, he had been assigned a new secretary—albeit not a "confidential" one—when he was transferred to DVP Technical (Reiter: Tr. 151-52). Although he states that the new secretary was "not at all at the same level as the secretary that [he] had" as DVP Engineering (Reiter: Tr. 151), the record is devoid of any evidence as to what this meant in terms of the support services he was provided. In any event, there is simply nothing in the record to indicate any quantifiable, objective benefit Reiter received by being awarded the "confidential secretary." In addition, while Reiter received in the final judgment "an office comparable to the office he previously had while" DVP Engineering, Judgment at 3, any quantifiable benefit Reiter received from this new office was minimal, if anything. In an analogous area, case law holds that the mere fact that an employee has lost desirable office space does not by itself constitute even an

adverse employment action within the meaning of Title VII. *See, e.g., Staff v. Pall Corp.*, 233 F.Supp.2d 516, 532 (S.D.N.Y.2002) (citing cases), *aff'd*, 76 Fed.Appx. 366, 2003 WL 22056230 (2d Cir. Sept.4, 2003).

In sum, the Court does not view any of the various injunctive elements of the final judgment as having any significant value. Of course, Reiter must necessarily feel some vindication from the fact that he obtained a court order requiring his reinstatement to the DVP Engineering job. *See, e.g.*, Pl. Reply Mem. at 5-6. But the value to him of this vindication is certainly not relevant for purposes of a Rule 68 analysis. Under Rule 68, only "the judgment finally obtained" is to be considered in the comparison with the offer of judgment. Thus, any incidental benefits to the judgment—such as a finding of liability or a ruling with precedential value to other potential litigants—are irrelevant. *See, e.g., Jolly*, 1999 WL 20895, at * 7-*8; *accord Spencer*, 894 F.2d at 663-64 (determining that the lower court erred in "includ[ing] the non-judgment relief [the plaintiff] acquired as part of her 'judgment finally obtained' " and that "in making the comparison required by [Rule 68], a trial court should consider only the terms of the 'judgment finally obtained' by the offeree, and nothing more"). This principle is perhaps at odds with the reasoning of *Stokes*, where the court concluded that a job position offered was not more favorable than the position obtained after judgment simply because the latter position was the very one that the plaintiff asserted he had been denied as a result of discrimination. *See* 157 F.R.D. at 518. This Court rejects the reasoning of *Stokes*, however, in light of Rule 68's directive to consider simply whether the "judgment finally obtained" is more

"favorable" than the offer. Such an analysis must be performed from an objective perspective, rather than being based on the subjective desires of the plaintiff. As such, a plaintiff's satisfaction in winning a favorable judgment has no bearing on the value of the relief obtained.

While the Court has discussed the value of each element of the final judgment separately, Rule 68 requires a comparison of the entire final judgment against the entire Offer. But stripped of the vindication value that might be attributed to Reiter's gratification in having obtained what he sought in a final judgment, the equitable elements of the final judgment together are of such limited value that the Court can only conclude that they would not be considered more favorable by an objective, reasonable person than a $10,001 cash payment. As a result, Reiter must bear any costs or fees he incurred after the making of the Offer.

Conclusion

The NYCTA must reimburse Reiter only for those attorney's fees and court costs incurred up to and including July 27, 2001. As described in a separate decision issued this date, Reiter's reasonable attorney's fees and court costs as of that date are $17,075.42. Accordingly, Reiter's application (Docket # 93) is granted to that extent. The Clerk is requested to enter judgment against NYCTA and in favor of Reiter for costs and attorney's fees in the amount of $17,075.42.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 29, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

Docket Number:	04-5420-cv
Short Title:	Reiter v. M.T.A. State of N.Y.
DC Docket Number:	01-cv-2762
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Gabriel Gorenst

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29th day of Sept. two thousand six.

John Reiter,

Plaintiff-Appellant,

v.

MTA New York City Transit Authority

Defendant-Appellee.

Appendix C

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Appellee MTA NYC Transit Authority. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: s/ [illegible]
Motion Staff Attorney

APPENDIX D — FEDERAL RULE OF CIVIL PROCEDURE RULE 68

Federal Rules of Civil Procedure Rule 68

United States Code Annotated Currentness

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Provisional and Final Remedies (Refs & Annos)

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment,

which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.